IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24..03..2005

CORAM

THE HON'BLE MR.MARKANDEY KATJU, CHIEF JUSTICE
and
THE HON'BLE MR.JUSTICE D.MURUGESAN

W.A.Nos.1452 and 1453 of 1998
and
W.A.M.P.Nos.15839 and 15840 of 1998

The Institute of Chartered Accountants of India,
Rep. by its Secretary,
Post Box No.7100,
New Delhi - 110 002. ..Appellant in both the appeals.

Vs.

1. K.Bhagvatheeswaran,
20A, Vyasarao Street,
T.Nagar, Madras - 17.

2. Union of India,
rep. by its Secretary to Government,
Ministry of Industries and Commerce,
New Delhi. ..Respondents in both the appeals.

PRAYER: Appeals filed against the common order of the learned single Judge dated 13.07.1998, passed in W.P.Nos.5925 & 5926 of 1989, as stated therein.

For Appellant :: Mr.Sampathkumar, Senior Counsel
For M/s.Sampathkumar Associates
For Respondent - 1 :: Mr.S.Elambharathi
For Respondent - 2 :: No appearance

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J U D G M E N T

THE HON'BLE THE CHIEF JUSTICE

These writ appeals have been filed against the common order of the learned single Judge dated 13.07.1998 passed in W.P.Nos.5925 and 5926 of 1989.

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2. We have heard learned counsel for the parties and perused the record.

3. The petitioner in both the writ petitions (1st respondent in both the writ appeals herein) is a practising Chartered Accountant and was a member of the Institute of Chartered Accountants of India. The petitioner alleged in his affidavit filed in support of Writ Petition No.5925 of 1989 that he was a partner of M/s.Shri & Co, a reputed Chartered Accountant firm which was started in Madras in 1938. It is alleged that the said firm had wide range of clientele belonging to both public and private sectors, and also of individuals, firms companies and trusts. It was also functioning as Tax Consultants and Tax Representatives. The profession of Chartered Accountants is governed by the Chartered Accountants Act, 1949 (herein after referred to as the Act). Section 3 of the Act provides that chartered accountants registered under Section 4 of the Act constitute a body called the Institute of Chartered Accountants of India. The Council of the said Institute constituted under Section 9 of the Act carries out the various functions mentioned in Section 15 and other provisions of the Act.

4. Various enactments such as the Companies Act, 1956, Income-tax Act, 1961 and the Banking Companies Regulations Act provide that only Chartered Accountants have a specified role to play in companies and other organizations. The intention obviously is that there should be uniform accountancy methods and high level of professionalism. Many years of hard work and knowledge is required to qualify as Member of the Institute and once a person acquired the required qualification he is free to engage himself in the profession without any kind of restriction except for professional misconduct as mentioned in Section - 22 of the Act. The Council set up by the Act has a general power to enquire into the allegations of misconduct of members of the Institute. It may be mentioned that there is compulsory audit of the books of accounts and other records of companies incorporated under the Companies Act, 1956 and also of all other persons whose turnover is in excess of Rs.20 lakhs under the Income-tax Act. Only a Chartered Accountant can issue a certificate under these Acts. By Finance Act, 1984 a new Section viz., Section 44 AB was introduced in the Income-tax Act, 1961 by which certain classes of assessees such as businessmen with a turnover of more than Rs.40 lakhs and a person carrying on a profession with a gross receipt of Rs.10 lakhs a year were required to get their accounts audited by a Chartered Accountant and get a report from him.

5. The petitioner has challenged the notifications dated 13.01.1989 and 25.05.1987 issued by the Union of India by which restrictions have been placed on his right to practice as a Chartered Accountant. Paragraph - 1 of the notification dated 13.01.1989 states:-

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"No.1-CA(7)/3/88:- In exercise of the powers conferred by clause (ii) of Part-II of the Second Schedule to the Chartered Accountants Act, 1949, the Council of the Institute of Chartered Accountants of India hereby specifies that a member of the Institute in practice shall be deemed to be guilty of professional misconduct if he accepts, in a financial year, more than the specified number of tax audit assignments under Section 44 AB of the Income-tax Act, 1961".

6. The explanation to the said notification states:-

"1. For the above purpose, the specified number of tax audit assignments means:-

a. In the case of a Chartered Accountant in practice or a proprietary firm of Chartered Accountants, 30 tax audit assignments, in a financial year, whether in respect of corporate or non-corporate assessees.

b. In the case of firm of Chartered Accountants in practice, 30 tax audit assignments per partner in the firm, in a financial year, whether in respect of corporate or non-corporate assessees.

2. In computing the specified number of tax audit assignments each years audit would be taken as a separate assignment.

3. In computing the specified number of tax audit assignments, the number of such assignments, which he or any partner of his firm has accepted whether singly or in combination with any other chartered accountant in practice or firm of such chartered accountants, shall be taken into account.

4. The audit of the head office and branch offices of a concern shall be regarded as one tax audit assignment.

5. The audit of one or more branches of the same concern by one chartered accountant in practice shall be construed as only one tax audit assignment.

6. The above notification shall come into force from the financial year commencing on or after 1st April, 1989.

7. A chartered accountant in practice and every partner of a firm of such chartered accountants holding immediately before 1st April 1989, tax audit assignments in excess of the specified number, shall within sixty days from 1st April 1989, intimate his inability to conduct tax

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audit in excess of the specified number to the concerned assessees.

8. A chartered accountant in practice shall maintain a record of the tax audit assignments accepted by him in each financial year in the format as may be prescribed by the Council."

7. The notification dated 25.05.1987 reads as follows:-

"No.1-CA(7)/158/87:- In exercise of the powers conferred by Clause (ii) of Part II of the Second Schedule to the Chartered Accountants Act, 1949 the Council of the Institute of Chartered Accountants of India hereby specifies that a member of the Institute in practice shall be deemed to be guilty of professional misconduct, if he on behalf of the firm of chartered accountants in which he is a partner (a) consisting of 4 or more partners but less than 8 partners with atleast one partner holding a certificate of practice for five years or more; or (b) consisting of 8 or more partners with at least one partner holding a certificate of practice for five years or more; accepts or carries out any audit work involving receipt of audit fees (excluding reimbursement of expenses, if any) for such work of any amount below what is specified hereunder:-

	Practising firm having 4 or more partners but less than 8 partners	Practicing firm having 8 or more partners
i) In cities with population of 2 million and above.	Rs.1500/- p.a.	Rs.3000/- p.a.
ii) In cities/town having population of less than 2 million	Rs.1000/- p.a.	Rs.2000/- p.a.

Provided that such restriction shall not apply in respect of the following:-

i) audit of accounts of charitable institutions, clubs, provident funds,

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etc., where the appointment is honorary i.e., without any fees;

ii) statutory audit of branches of banks including regional rural banks;

iii) audit of newly formed concerns relating to two accounting years from the date of commencement of their operation; and

iv) certification or audit under Income-tax Act or other attestation work carried out by the statutory auditor.

This becomes operative for all audits relating to accounting periods beginning on or after 1st August, 1987.

Explanation:-

For the purpose of this notification, the expression statutory auditor means and includes a chartered accountant appointed as an auditor under a Central/State or Provincial Act as well as an auditor appointed under any agreement."

8. The petitioner challenged the aforesaid notifications on the ground that they violate his fundamental rights guaranteed under Article 19(1)(g) and Article 14 of the Constitution of India. It was alleged that there was no reasonable classification, and the impugned notifications were arbitrary and unreasonable.

9. We have also perused the counter affidavits filed in support of the writ petitions. In paragraph - 10 of the counter affidavit filed in support of the Writ Petition No.5925 of 1989 it is stated:

"The notification would enable a larger section of the members of the Institute in practice all over the country to conduct tax audit assignments and thus cater to enlargement of the work of professional chartered accountants as a result of the introduction of compulsory tax audit in respect of assessees and professional persons. This restriction would enable professional work in relation to compulsory tax audit to be diversified and distributed among young and less advantaged members who are clamoring for professional work and livelihood. Thus, there is no unreasonable restriction of which any grievance can be made by any professional member of the Institute."

10. Thus, the imposition of restriction on the volume of audits and fee which a Chartered Accountant can accept is sought to be justified on the ground that this restriction would enable

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younger and less fortunate members among the Chartered Accountants to get professional work and earn their livelihood. In our opinion, this is a wholly unreasonable and untenable ground.

11. It is well known that each profession has its own historical conventions, traditions, customs and practices and it has never been the conventions, tradition, custom or practice among the professions like Lawyers' profession, Chartered Accountants' profession, etc., that work must be diversified to young and less fortunate professionals by restricting the number of cases/audits which can be accepted by a Lawyer/Chartered Accountant. In our opinion, placing restrictions on the number of cases/audits which can be accepted by a Lawyer/Chartered Accountant is an unreasonable restriction under Article 19(6) of the Constitution and is also violative of Article 14, taking into account the historical growth and development of these professions, and their traditional and customary practices. A client must be free to chose his Lawyer/Chartered Accountant, and conversely the number of cases/audits which can be accepted by a professional must be left free to decide by the Lawyer/Chartered Accountant of his own free will. Such restrictions can only be voluntary and not imposed by any external authority on the members of the profession. Hence, we fully agree with the view taken by the learned single Judge in paragraph – 10 of the impugned order. We fully concur with his view that accepting larger number of audits cannot be regarded as professional misconduct. The term 'professional misconduct' has a historical and traditional meaning attached to it. So far as it relates to the chartered accountant's profession, 'professional misconduct' really means acts mentioned in the Schedules to the Act or similar acts like cheating or dis-honesty but it cannot mean accepting a large number of cases/audits or a certain fee. Some lawyers/accountants are more intelligent and more hard working than others. That being so it would be penalising them for their intelligence, knowledge and hard work. The choice of the Lawyer/Chartered Accountant and the fee should be left at the option of the client. It is a matter of free contact between the client and the Lawyer/Chartered Accountant. Artificial devices like the kind of the impugned restrictions cannot be accepted in these professional occupations.

12. In our opinion this is not simply a matter of written rules and regulations. Every profession has its own historical and traditional unwritten conventions, norms and work culture, and when deciding whether the restrictions are reasonable or not under Article 19(6) of the Constitution, the Court cannot be oblivious to these unwritten conventions and traditions. We therefore agree with the view taken by the learned single Judge in paragraph – 10 to 12 of his order.

13. As regards the notification dated 25.5.1987 which has been challenged in W.P.No.5926 of 1989, we have perused the same, and we

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are of the opinion that the notification dated 25.05.1987 is also arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution. We have already quoted the notification dated 25.05.1987 above. We are fully in agreement with the learned single Judge who has observed in paragraph – 10 of his order that the said notification is illegal as it affects the fundamental right of the petitioner to carry on his profession under Article 19(1)(g) and Article 14 of the Constitution. In our opinion, the restriction is unreasonable taking into account the conventions and historical traditions of the professional occupation, as already discussed above. The learned single Judge, in our opinion, has rightly held that charging a certain fee by a professional can never be regarded as unprofessional. What will be the fee is a matter to be decided by mutual consent between the client and the professional and the parties must be left free in this connection. Charging higher or lower fee can certainly not be regarded as professional misconduct. The matter must be left to the discretion of the client and the professional. Some lawyers/chartered accountants charge higher fee while others charge lower fee, and even the fee of the same professional some times differs from client to client. All these must be left to the free and voluntary agreement between the parties and there should not be any artificial restrictions placed by some external authority.

14. The learned counsel for the appellant has relied on the decision of the Supreme Court in Minerva Talkies, Bangalore and Others Vs. State of Karnataka and Others, AIR 1988 Supreme Court 526 wherein it was held that the rule limiting the cinema shows to 4 per day was not ultra vires to Article 19(1)(g) of the Constitution. In our opinion, cinema shows and professional occupation cannot be treated alike. Running of the cinema is in the nature of a business, whereas professional occupations are not business enterprises. The professions have their own long historical traditions and conventions which are totally different from that of business enterprises. Hence, the aforesaid decision is distinguishable.

15. Similarly, the decision in Deepak Theatre, Dhuri Vs. State of Punjab and Others, AIR 1992 SC 1519 which uphold the validity of a rule classifying the number of seats in a cinema theatre and fixing the rates of admission is also distinguishable for the same reason. The learned counsel for the appellant then relied on the decision of the Supreme Court in T.Velayudhan Achari and Another Vs. Union of India and Others, (1993) 2 SCC 582 wherein it was held that limiting the number of depositors that can be accepted by an individual, firm or unincorporated associations under Section 45-S (1) of the Banking Laws (Amendment) Act, 1983 is not violative of Article 19(1)(g) of the Constitution as it protects the larger interests of the depositors. In our opinion, this decision is also distinguishable as it does not relate to professions.

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16. We would like to repeat that the professions like Lawyer's profession, Chartered Accountant's profession, etc cannot be compared to business enterprises as they have their own historical conventions and traditions which have evolved over centuries. Hence, the rulings of the Supreme Court or other Courts cannot be applied mechanically without properly understanding the context in which those rulings were delivered. What may be a reasonable restriction for a business may be unreasonable for a profession. Hence, we cannot accept the submissions of the learned counsel for the appellant.

17. As regards Clause (i) of Article 19(6) of the Constitution, in our opinion, this has no application as the impugned notifications have nothing to do with professional qualifications for practising as a chartered accountant.

18. For the reasons given above there is no force in these appeals and they are accordingly dismissed. No costs. Consequently, connected W.A.M.Ps. are also dismissed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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Union of India,
Ministry of Industries and Commerce,
New Delhi.

+ One cc to Mr.K.J. Rebello, Advocate (SR 14085)

+ Two Ccs to M/s Sampathkumar Associates (SR 14281)

+ One cc to Government Pleader (SR 14305)

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